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BEFORE THE ARIZONA CORPORATION COMMISSION

AZ CORP COMMISSION  
DOCKET CONTROL

COMMISSIONERS

MIKE GLEASON, Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
KRISTIN K. MAYES  
GARY PIERCE

In the matter of:

MARK W. BOSWORTH and LISA A.  
BOSWORTH, husband and wife;

STEPHEN G. VAN CAMPEN and DIANE  
V. VAN CAMPEN, husband and wife;

MICHAEL J. SARGENT and PEGGY L.  
SARGENT, husband and wife;

ROBERT BORNHOLDT and JANE DOE  
BORNHOLDT, husband and wife;

MARK BOSWORTH & ASSOCIATES,  
L.L.C., an Arizona limited liability company;

3 GRINGOS MEXICAN INVESTMENTS,  
L.L.C., an Arizona limited liability company;

Respondents.

DOCKET NO. S-20600A-08-0340

**RESPONSE TO RESPONDENTS MICHAEL J.  
AND PEGGY L. SARGENT'S MOTION TO  
STAY**

(Assigned to the Honorable Marc E. Stern)

Arizona Corporation Commission  
**DOCKETED**

SEP -5 2008

DOCKETED BY

The Securities Division ("the Division") of the Arizona Corporation Commission ("the Commission") hereby responds to Respondents Michael J. and Peggy L. Sargent's ("Sargent") Motion to Stay ("the Motion") and requests that it be denied. This Response is supported by the following Memorandum of Points and Authorities.

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

Sargent allegedly heard that he is a target of a criminal investigation. This can be neither confirmed nor denied. What can be confirmed, however, is that Sargent is **NOT** the defendant in any criminal case, he does **NOT** face criminal charges, and he has **NOT** been indicted.

In the Motion, Sargent has requested a stay of this proceeding because he **MAY** wish to assert his Fifth Amendment right to remain silent when asked questions by the Division. What if the Division doesn't ask him any questions?

Sargent is essentially asking the Administrative Law Judge to indefinitely delay justice for the dozens of investors who deserve to have the merits of this case heard and to have liability for their millions of dollars of losses determined. To maintain public confidence in the enforcement efforts of the Division, this case must not be delayed.

Sargent cannot show the substantial prejudice to his rights that is required by law for a stay. As such, the Motion should be denied.

**II. ARGUMENT**

Whether to grant a stay in this proceeding is within the sound discretion of the Administrative Law Judge. See, State v. Ott, 167 Ariz. 420, 428, 808 P.2d 305, 313 (Ct. App. 1990) (citing Afro-Lecon v. United States, 820 F.2d 1198, 1202 (Fed. Cir. 1987)). Neither the federal nor the state constitution prohibits parallel civil and criminal proceedings. Id. (citing United States v. Kordel, 397 U.S. 1, 12 n. 27 (1970)). In fact, civil proceedings generally should be stayed only if parallel proceedings would substantially prejudice the defendant's rights. Id. (citing Securities and Exchange Comm'n v. Dresser Industries, 628 F.2d 1368, 1374 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980)). The decision whether to stay civil proceedings in the face of a parallel criminal proceeding should be made "in light of the particular circumstances and competing interests involved in the case." Federal Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9<sup>th</sup> Cir. 1989).

1       The strongest case for granting a stay is where a party under criminal indictment is required  
2 to defend a civil proceeding involving the same matter. Dresser Industries, F.2d at 1375-76. The  
3 decisionmaker should consider the extent to which the defendant's Fifth Amendment rights may be  
4 implicated. See, e.g., Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9<sup>th</sup> Cir. 1994), cert.  
5 denied, 516 U.S. 827 (1995). In addition, the decisionmaker should generally consider the  
6 following factors: (1) the interest of the plaintiff in proceeding expeditiously with the litigation and  
7 any potential prejudice to plaintiff if the proceeding is delayed, (2) the burden that is imposed on the  
8 defendant, (3) the convenience of the court in the management of its cases and the efficient use of  
9 judicial resources, (4) the interests of persons that are not parties to the civil litigation, and (5) the  
10 interest of the public in the pending proceedings. See, e.g., Keating, 45 F.3d at 324-25. When one  
11 considers Sargent's Fifth Amendment rights as well as the remaining factors, it is clear the analysis  
12 does not support a stay of this proceeding.

13       **A.       Sargent's Fifth Amendment Rights are not Implicated in this Proceeding.**

14       Even where the same individual defendant is involved in both civil and criminal  
15 proceedings, the courts can require a litigant to choose between invoking the Fifth Amendment in  
16 a civil case, thus risking a loss there, or answering the questions in the civil context, thus risking  
17 subsequent criminal prosecution. See, e.g., Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976).  
18 Generally, in such cases the courts have allowed the civil case to proceed after weighing the  
19 competing interests involved. See, e.g., State v. Ott, 167 Ariz. 420, 808 P.2d 305 (Ct. App. 1990);  
20 Keating v. Office of Thrift Supervision, 45 F.3d 322 (9<sup>th</sup> Cir. 1994), cert. denied, 516 U.S. 827  
21 (1995); Federal Sav. And Loan Ins. Corp. v. Molinaro, 889 F.2d 899 (9<sup>th</sup> Cir. 1989); Securities &  
22 Exchange Comm'n v. Dresser Indus., 628 F.2d 1368, 1376 (D.C. Cir.) cert. denied, 449 U.S. 993  
23 (1980).

24       Like this case, Keating and Molinaro involved administrative agencies bringing actions in  
25 the public interest. But unlike this case, the defendants in Keating and Molinaro were individuals  
26 who were charged in both the civil and criminal proceedings. In both cases the courts found, after

1 weighing the competing interests (including the extent to which the defendants' Fifth Amendment  
2 rights were implicated), that it was appropriate to allow the civil proceedings to continue. Keating,  
3 45 F.3d at 326; Molinaro, 889 F.2d at 902-03.

4 The case for staying civil proceedings is "a far weaker one" when "[n]o indictment has been  
5 returned [and thus] no Fifth Amendment privilege is threatened." Molinaro, 889 F.2d at 903  
6 (quoting Dresser Industries, 628 F.2d at 1376). No indictments have been returned in this case, thus  
7 no Fifth Amendment rights are threatened.

8 **B. The Division's Interest in Proceeding Expeditiously is Great.**

9 Any delay in prosecuting this matter will adversely affect the Division's interests. Dozens of  
10 Arizona investors are waiting for an opportunity to have the merits of this case heard. Any delay  
11 would have a detrimental effect on public confidence in the enforcement efforts of the Division. It is  
12 appropriate for the Administrative Law Judge to consider this factor in determining whether a stay  
13 should be granted. See, Keating, 45 F.3d at 326 (detrimental effect on public confidence in  
14 enforcement scheme for thrift institutions would occur from stay); Molinaro 889 F2d at 903  
15 (interests of depositors would be frustrated from stay).

16 **C. Sargent will not have any Greater Burden upon Denial of a Stay.**

17 Denial of a stay will not negatively affect (in fact, it may enhance) Sargent's ability to mount  
18 his defense in this case. Even though he may exercise his right to remain silent, Sargent will still be  
19 able to cross examine the witnesses against him (in this case, scores of investors and others who will  
20 testify as to the often-complicated financial transactions involved in the fraud perpetrated on  
21 investors and to authenticate the hundreds of documents involved), introduce and challenge  
22 evidence, etc. The longer the delay as a result of a stay, the more likely it is that memories will fade  
23 and the harder it will be for Sargent to mount his defense.

24 **D. A Stay will not Provide Greater Convenience to the Parties and/or Division.**

25 A stay would be inconvenient not only because of the delay, but because the Division  
26 would be forced to put on its case at least twice – first against respondents who are not the

1 subject of a stay and later against the others. Of course, a stay as to all respondents is out of the  
2 question and would not only be violative of the law, it would be contrary to the interests of the  
3 investors in this case and the public as a whole.

4 **E. Investors will Suffer if a Stay is Granted.**

5 It could be said that the harm to investors is complete and that investors do not have a  
6 compelling need for immediate resolution of the Division's allegations. Such an argument does not  
7 give the respect to, or understanding of, investors' positions that investors deserve.

8 This case involves dozens of investors who have lost more than money, they have lost faith.  
9 The investors are seeking justice and an understanding of what exactly happened. They want to  
10 know how they lost money when there were professionals like Sargent involved with Mark  
11 Bosworth and his companies. They want and deserve liability determined.

12 **F. The Public Interest will be Adversely Affected by a Stay.**

13 Citing uncontrolling authority, Sargent essentially argues that the public's interest in a  
14 prospective criminal case is entitled to precedence over this, pending case. Sargent also argues that,  
15 since the Division is immune to any statutes of limitation and since there are no ongoing sales of  
16 securities, the public's interest will not be adversely affected by a stay. On the contrary, there is a  
17 pressing need to determine the liability of parties involved in this tragic situation. As a regulatory  
18 body, the Division is keenly aware of the need to reassure the public that it is seeking a  
19 determination of responsibility. See, Keating, 45 F.3d at 326. It would be completely unacceptable  
20 to allow this case to drag on unprosecuted for months, years even.

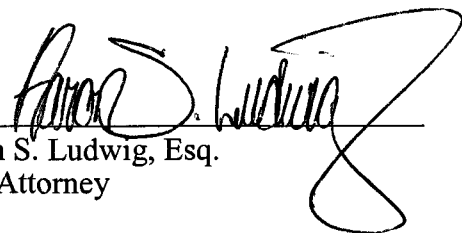
21 If the Division's allegations in its Notice are true, there is more to this case than just a  
22 failure to disclose risks; there was actual perpetration of fraud by Sargent. There can be no  
23 stronger public interest than to send a message to the financial community that the Division will  
24 take action against professionals when such action is warranted. Any delay would be detrimental  
25 to public confidence in the enforcement scheme of the Securities Act. Id.

1 **III. CONCLUSION**

2 Based on the foregoing, it is apparent that Sargent has not shown any prejudice, let alone  
3 substantial prejudice, to his rights by this case proceeding. Sargent's Fifth Amendment rights are  
4 not implicated and the remaining factors all support the conclusion that this matter should  
5 continue. Accordingly, the Motion should be denied.

6 RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of September 2008.

7  
8 **SECURITIES DIVISION of the**  
9 **ARIZONA CORPORATION COMMISSION**

10   
11 Aaron S. Ludwig, Esq.  
12 Staff Attorney

13 **ORIGINAL** and **13 COPIES** of the foregoing filed  
14 this 5<sup>th</sup> day of September 2008 with:

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17 **COPY** of the foregoing mailed/delivered  
18 this 5<sup>th</sup> day of September 2008 to:

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